

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4

5 UNITED STATES OF AMERICA,
6 Plaintiff,

7 v.

CASE NO: 1:03-CR-291
1:07-CR-267

8 TOBY T. STUDABAKER,
9 Defendant.

10 _____/

11

12 * * * *
13 REDACTED TRANSCRIPT
14 SENTENCING HEARING
15 * * * *

16 BEFORE: THE HONORABLE PAUL L. MALONEY
17 United States District Judge
18 Kalamazoo, Michigan
19 April 21, 2008

20 APPEARANCES:

21 APPEARING ON BEHALF OF THE PLAINTIFF:

22 DANIEL Y. MEKARU
23 Assistant United States Attorney
24 P.O. Box 208
25 Grand Rapids, Michigan 49501-0208

26 APPEARING ON BEHALF OF THE DEFENDANT:

27 PAUL J. DENENFELD
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31

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1 Kalamazoo, Michigan
2 April 21, 2008
3 at approximately 3:09 p.m.

4 PROCEEDINGS

5 THE COURT: This is 03-291 and 07-267; the
6 United States of America vs. Toby Studabaker. This matter is
7 before the Court for sentencing.

8 The record should reflect that Assistant United
9 States Attorney Daniel Mekaru is here on behalf of the
10 government. Attorney Paul Denenfeld is here on behalf of the
11 defendant. The defendant is present in person.

12 The defendant pled guilty before Magistrate Judge
13 Ellen S. Carmody on November 20 of the year 2007, in both
14 files. The plea was accepted by Senior Judge Richard Alan
15 Enslen on December 20 of the year 2007. The case was
16 reassigned to this Court recently, I believe, just prior to the
17 adjourned sentencing date in this matter. At that time, there
18 was a request for a continuance. The Court asked for briefing
19 on certain legal issues in the case. I do have one objection
20 to resolve. I don't know if it's been withdrawn or not.

21 Mr. Mekaru, do you seek a ruling, sir, on the issue
22 related to Guideline 4B1.5, related to pattern of conduct?

23 MR. MEKARU: Yes, your Honor. But we don't have any
24 additional evidence to present to the Court. We rely on our
25 briefs and the reports that were generated by the, I think it

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1 was the Michigan State Police out of St. Joseph County.

2 Thank you.

3 THE COURT: All right. Thank you.

4 Mr. Denenfeld, do you wish to be heard on that
5 matter, other than what is in your memo?

6 MR. DENENFELD: I'll rest on what is in my memo, your
7 Honor.

8 THE COURT: All right. Thank you.

9 The government over-- or the Court overrules the
10 government's objection. The Court finds there is inadequate
11 evidentiary support for the application of that guideline,
12 which would have resulted in an, I believe it was a five-level
13 enhancement. But in any event, the Court finds that that is
14 not a guideline that should be scored. Accordingly, the
15 government's objection is overruled.

16 The Court finds under the advisory guidelines that
17 the Advisory Guideline Level is 27, the Criminal History
18 Category is I, resulting in a guideline range of 70 to 80
19 months.

20 Mr. Mekaru, setting aside the objection I've just
21 overruled, is the guideline range appropriately scored?

22 MR. MEKARU: Yes, your Honor. I just, again, this is
23 more perhaps-- perhaps this is more in the nature of my request
24 for the departure for variance, but I did note that because we
25 folded two cases in together, and I've always considered the

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1 exploitation of the child and the sexual assault against a
2 child to be a major case, that we have folded in the prior
3 conviction from England into the scoring of his criminal
4 history-- I'm sorry, into the scoring of his relevant conduct,
5 so therefore, it's not available for the criminal history
6 computation, that it otherwise would be if we were only dealing
7 with the child pornography case out of North Carolina. Because
8 it all is folded in, I am willing to so state that we don't
9 have any objections. I just wanted to make note that there is
10 that issue. So I realize I'm speaking perhaps out of both
11 sides of my face, but we will stand by the computation as is.

12 THE COURT: All right. I mean this is for purposes
13 of determining whether the guidelines are adequately-- or
14 completely and accurately scored. I recognize that there are
15 requests for variances on both sides, and the Court has given
16 notice of a potential upward departure or variance also. But
17 for purposes of nailing down whether the advisory guideline
18 range is appropriately scored or not, do you concur or not?

19 MR. MEKARU: I'm sorry, your Honor, yes, I do.

20 THE COURT: Mr. Denenfeld?

21 MR. DENENFELD: I believe so. I thought I heard you
22 say 70 to 80 months, and I think it's 87.

23 THE COURT: It's 87.

24 MR. DENENFELD: Yes, your Honor.

25 THE COURT: Thank you.

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1 All right. Mr. Mekaru, are you moving third level of
2 acceptance?

3 MR. MEKARU: Yes, your Honor.

4 THE COURT: All right. That motion is granted. That
5 does not change the advisory guideline range because the Court
6 anticipated the making of the motion and the granting thereof.

7 Mr. Denenfeld, have you had the opportunity, sir, of
8 reviewing the presentence report with your client?

9 MR. DENENFELD: I have, your Honor.

10 THE COURT: And does defense have any objections that
11 have not already been taken care of?

12 MR. DENENFELD: We do not, your Honor.

13 THE COURT: Mr. Studabaker, is that correct, sir,
14 you've had adequate time to review the presentence report with
15 your lawyer, Mr. Denenfeld?

16 THE DEFENDANT: Yes, I have, sir.

17 THE COURT: Is Mr. Denenfeld's statement correct,
18 that you have no objections; is that right?

19 THE DEFENDANT: That is correct, your Honor.

20 THE COURT: All right. Thank you very much.

21 Are you satisfied with Mr. Denenfeld's work on your
22 behalf?

23 THE DEFENDANT: Yes, I am, your Honor.

24 THE COURT: Thank you.

25 All right. As I said, I have a request from the

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1 government for an upward departure variance. I have a request
2 for a downward departure or variance from the defense. The
3 Court through a notice filed on March 27, 2008, gave notice
4 that I was considering an upward departure or a variance from
5 the advisory guideline range for the reasons delineated
6 therein. And I will hear from counsel on all of the matters
7 attendant to the sentencing at this time.

8 So, Mr. Mekaru, on behalf of the government, sir.

9 MR. MEKARU: Thank you, your Honor.

10 Your Honor, I guess first I'll address the issue of
11 the fact that, as I so butchered, this question of the fact
12 there are two cases that have been folded into one. And I
13 realize this is of the government's making, we have asked this
14 Court to consider consolidated resolution of this case, and we
15 nonetheless, feel that is appropriate, it's a good use of the
16 government's resources as well as the Court's resources to do
17 this. But I do realize by doing this we have created a number
18 of issues for this Court's consideration, and for sentencing.

19 Now, you've asked-- you've asked us to brief this
20 question of the impact of 5G1.3. Now, 5G1.3 generally deals
21 with a situation where you have an undischarged term of
22 incarceration, where defendant is still serving custody time
23 under some other-- in some other jurisdiction or as relates to
24 some other case and they are now before this Court. That is
25 not the situation we have here. Mr. Studabaker has completed

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1 his sentence in England. He is in custody right now solely
2 based on the fact that he is charged in the Western District of
3 Michigan and the Eastern District of North Carolina. So what
4 we have instead is a discharged term.

5 Now, in most instances where have you a discharged
6 term of incarceration, that falls just in the general category
7 of prior criminal history. It is only if there is some overlap
8 between the prior, for example, prior state case and the
9 instant federal case. Or in this particular case, some overlap
10 between the case in England and the case before you that
11 perhaps there is some sort of consideration that should be
12 given to the defendant. And I believe that is, not to speak
13 for Mr. Denenfeld, but I believe that's where counsel has asked
14 for this Court, under the commentary, to consider a departure,
15 because the commentary does authorize this Court to give some
16 sort of credit for that prior term of incarceration.

17 Now, that said. First with respect to the case in
18 England. The charges in England do overlap the charges that
19 were brought in this district, but not entirely. The charges
20 in England were for inducing an act of gross indecency, and
21 abduction of a minor. Now, that was not kidnapping. It was
22 essentially the taking of a minor from her parents without
23 their permission or authority.

24 The charges we have in Michigan deal with coercion or
25 enticement and also include the act of traveling from the

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1 United States overseas and actually committing a sex act. The
2 charges in England could not address the fact that the
3 defendant had sex or raped this 12-year-old girl in France.
4 The French authorities could have jurisdiction over that, but
5 not in England.

6 Now, in response actually to this case, the English
7 authorities have since enacted new laws to address this very
8 conduct. But nonetheless, the prosecution in England did not
9 address the fact that the sentence in England did not address
10 the fact that the defendant had raped a 12-year-old girl, and
11 that's what we have before you today.

12 Now, I do understand though that the overall facts of
13 the incident in England is identical to the facts you have
14 before you in the Michigan case. And perhaps if that was the
15 sole matter before this Court, there might still be some room
16 for some consideration for the defendant. Set that aside.
17 North Carolina. The North Carolina case deals with child
18 pornography. The English prosecution had no bearing whatsoever
19 on the case in North Carolina. There was no prosecution for
20 child pornography, no sentence imposed for child pornography,
21 no consideration given at the time of sentencing for that
22 offense. So if we were to look solely at the case in North
23 Carolina, it would look back at this conviction in England
24 purely as just prior criminal history. And as I suggested in
25 our sentencing memorandum, the supplemental, that the

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1 defendant's criminal history score would be incrementally
2 higher because he would be one criminal history category higher
3 under the recommended guideline computation.

4 All right. So that is my analysis of this 5G1.3 and
5 how it may or may not come into play in the sentencing in this
6 case.

7 Your Honor, it would be the government's position, at
8 this point, that as a consolidated case, no credit should be
9 given to the defendant under 5G1.3, and more specifically
10 5G1.3(b) is the section that could be implicated.

11 Also, just so the Court is aware, if the Court were
12 of a mind to grant credit for the time in England, the
13 defendant has served essentially a four-year sentence for the
14 criminal offense. His date of discharge on that criminal
15 offense, his date of release was August 21st of 2006. At that
16 moment, he was no longer in custody on a criminal case. His
17 status in England was that of an undesirable, an individual who
18 was in the country, as far as they were concerned, unlawfully,
19 and was subject to deportation. Now, the defendant was given
20 notice of this intent to deport and filed a notice-- his own
21 notice of appeal. From August 21st, 2006, until his return to
22 the United States in 2007, it was June 2nd, 2007, his custody
23 in England was for an immigration matter, not on any sort of
24 criminal charges. So if this Court were of a mind to grant the
25 defendant some sort of consideration for time, there is

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1 absolutely no overlap between his UK sentence of incarceration
2 on a criminal case-- excuse me, there is no overlap between the
3 deportation immigration matter and the criminal charges.

4 All right. Now, to this question of the defendant's
5 sentence. Your Honor, it's the government's position that an
6 advisory range is 70 to 87 months does not adequately reflect
7 and adequately address the defendant's conduct and that a
8 departure is appropriate. Primarily the government's concern
9 here has to do with the defendant's prior history of trolling
10 for children and grooming children and are concerned of his
11 future risk.

12 Now, the guidelines under 4B1.5 and under 2G2.2, we
13 will address this pattern question, but that is a very narrow
14 definition. And as this Court has already ruled, given the
15 limited facts that were available regarding the 1998
16 conviction, that this Court would have some difficulty in
17 scoring that enhancement based on those limited facts, so we
18 understand that, but nonetheless, felt there might be
19 sufficient evidence for the Court's consideration.

20 But setting aside what is specifically enumerated and
21 scored under a guideline, let's consider overall under 3553,
22 the nature of this individual. What has he demonstrated for
23 us? Your Honor, the defendant is interested in children, and
24 he is interested in children as objects for sexual desire.

25 Now, how can I make that declaration? Because the

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1 defendant groomed an 11-year-old girl from England, took this
2 child and accelerated her maturation and her sexual knowledge
3 so that when he actually met her in person, he already laid the
4 groundwork for her to be a willing participant in his sexual
5 exploit. This is a child who was 12 years old.

6 Now, in addition to this victim, we have prosecuted
7 the defendant for raping. Law enforcement has determined that
8 this isn't the only instance where the defendant has gone out
9 seeking a child. The defendant used the internet, cast a wide
10 net looking for children who were vulnerable. He was able to
11 establish an internet relationship with a child in Australia,
12 who was 10 years old. Two more internet relationships that we
13 have been able to identify with girls in Newaygo County, who
14 were 11 years old.

15 Now, what we found out through the investigation is
16 that the victim in this case, S.P., originally met the
17 defendant through the website called Neopets. Now, as we have
18 briefed this Court and provided information, Neopets is a
19 website that caters to children. Their own records and their
20 own demographics indicate that the vast majority of their users
21 are minors, and a substantial portion of their users are under
22 the age of 12, very young children. And the defendant's
23 meeting, frequenting this website and meets S.P., who is 11
24 years old. In addition, he also met a child who was in
25 Australia, and she was 10 years old, through Neopets.

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1 What is a man who is 31 years old doing trolling
2 around at a website designed for children? Now, he can say
3 well, there are other adults who are interested in this. This
4 could be something other adults are interested in, perhaps, but
5 perhaps instead it's because the defendant has an interest in
6 children and this is his way of getting access to them. And
7 that's borne out by the fact that he actually was able to get
8 access to S.P.

9 Now, part of the conversation he had with that girl
10 in Australia included things like, "What is the color of your
11 bathing suit? Do you have a boyfriend?" You're asking a
12 10-year-old, do you have a boyfriend? Are your parents around?

13 Is your mom around right now? Are you alone? That became
14 important for him to be able to separate her from her parents
15 so he could have this window of communication that was
16 unsupervised.

17 The defendant again established his relationships
18 with these other girls up in Newaygo.

19 Now, I understand the defendant was serving this
20 country, and perhaps as part of the school program that he was
21 communicating with these children who were encouraged to have
22 communications with soldiers serving overseas. Okay, that's
23 possible, sure. But again, your Honor, it's like looking at
24 this Neopets website, it's a legitimate website, this
25 communication with children and soldiers is a legitimate

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1 program, but instead the defendant used these programs to his
2 advantage.

3 Now, not only just communicating with these girls,
4 but again, trying to establish relationships with them to go
5 meet them to the point where one of these girls is making notes
6 and talking about how she loves Toby. What I find troubling
7 about that statement is saying, "I love Toby," is that that is
8 the exact same statement that I saw from S.P. Again,
9 handwritten notes, "love Toby."

10 While adults can differentiate between a parent's
11 love for a child, an adult's fondness for a child, a child's
12 understanding of what is encompassed and what is meant by love
13 can be turned upside down by an adult who is grooming that girl
14 to believe that not only is it love as an emotion as something
15 that you want to care for and protect, but it's love as an
16 avenue for sex. And what we saw with the chats with S.P. was
17 exactly that, where this young girl is talking about this
18 romanticized notion of what she thought love might be,
19 caressing the hair, oh, isn't that lovely. And then the
20 defendant is talking about groping her and his digital
21 penetration of her vagina.

22 It is the government's estimation that this defendant
23 poses a risk, and will continue to pose a risk to children, and
24 that his conduct at this point warrants a sentence that is
25 greater than this recommended range. And that his danger to

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1 the community requires this Court to consider a sentence above
2 the recommended range.

3 Now, today I was provided information by Deputy
4 Gelement, and he was provided information, I believe, by a
5 Kalamazoo Sheriffs Department. On one hand when I received it
6 and read through the report, I kind of scratched my head and
7 wondered what exactly was the significance of this. I believe
8 the Court has been provided a copy, but if I may for the record
9 purposes at least establish my understanding is that the
10 defendant, Toby Studabaker, re-established an old relationship
11 with a woman by the name of Jennifer, last name escapes me,
12 Davis-- Jennifer Davis.

13 As I understand, Ms. Davis is blind or sight impaired
14 and hearing impaired, and that while she may dispute this
15 notion, it's my understanding that she's also suffering from
16 some mental disability. Now, we have spoken with her mother,
17 Patricia Newman, who has confirmed her physical disabilities as
18 well as her mental disabilities. Now, what I understand is
19 that Mr. Studabaker and Ms. Davis have been talking about
20 future plans, potentially even a marriage, and that he wants to
21 have some future relationship with her.

22 Now, Ms. Davis is an adult, I think she's perhaps
23 30-- in her thirties, which could be just fine. I think Mr.
24 Denenfeld has also done some investigation into this question
25 of the relationship as to whether there is much tension between

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1 Ms. Davis and Mr. Studabaker, I don't know quite what to make
2 of it. As I understand it, there is some relationship, and
3 there was some desire to have a life together.

4 Now, what I find, as a prosecutor, troubling about
5 that situation is the fact Miss Davis has four children, all
6 young children. It has been my experience in these cases that
7 it's often true that defendants or offenders who have a sexual
8 interest in children will befriend women, single women who have
9 children in the home. Why? Because that gives them access to
10 those kids.

11 Now, I don't know if the defendant realizes this or
12 not, and it's been-- we have been advised that maybe he is not
13 aware of this, but three of those children are no longer in Ms.
14 Davis' care and custody or in any way under the care, custody,
15 and control of her family. They have all been adopted by
16 others. There remains one child though who is still within the
17 family, and as I understand it, this child's first name begins
18 with S, is in the care of Ms. Davis' mother, Patty Newman.
19 This girl is seven years old.

20 As I understand it, and speaking with my agent, he
21 had contacted Ms. Newman, that Mr. Studabaker will often call
22 to speak with Ms. Newman, and then will inquire about S, "How
23 is she? How is she doing? May I speak with her?" And will
24 have conversations with her quite regularly on the phone.

25 Your Honor, that strikes me as much of the same

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1 conduct as I had seen with S.P., this girl in England, the
2 10-year-old child in Australia and these 11-year-old girls up
3 in Newaygo. Again, the defendant having an interest in a young
4 female. She's seven years old.

5 The defendant-- Well, here's what I also
6 understand: That, according to Ms. Newman, at some point
7 someone had initiated an inquiry with the State of Michigan
8 asking about getting benefits, government benefits for S when S
9 gets back into the custody of her mother, Ms. Davis. So it is
10 somehow planned out that this child will be removed from the
11 grandparent and come back into the home with her biological
12 mother, in a home that apparently the defendant will share.
13 Now, Ms. Newman has indicated that's not something that she
14 initiated, and as she understands it, that's not something that
15 Ms. Davis initiated nor any other family member. The only
16 other person who knew about this relationship and the fact that
17 Ms. Newman had custody of this child was Mr. Studabaker. I
18 realize this is some speculation on their part, but they,
19 through the process of elimination, have determined that it
20 would be Mr. Studabaker would be the one who would be driving
21 this. Now, it's possible that his fiance, Ms. Davis, could
22 have had a part in this too. But again, what that does is puts
23 Mr. Studabaker back into anticipating his release from custody
24 at some point in a home with a child that he could have access
25 to. He serves another few years, say 70 months, credit for

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1 four years, he could be out in another two, she would be nine
2 years old.

3 Now, I've also been told there is some unfortunate
4 information about this child's health. According to Ms.
5 Newman, the child is suffering from what she described as a
6 brain tumor. She may be, as I understand it, terminal. And
7 again, the other information that we had is Mr. Studabaker may
8 or may not have been aware about the other three children being
9 no longer in the home. So that's what we have been sorting out
10 through today.

11 What other sort of information do we have of recent
12 conduct where the defendant is continuing to try to have a
13 contact with children, he tried to contact S.P.,
14 he sent her a letter, a card. That was intercepted by the
15 authorities in England. But this was after his sentence, after
16 he was already incarcerated. He's continuing to try to
17 communicate with S.P.

18 While this defendant has expressed in his presentence
19 report an understanding of going through sex offender treatment
20 of a better understanding of himself, it doesn't appear he has
21 had a better understanding of what his actions have on others.
22 Imagine the impact on this child to receive out of the blue a
23 letter from the defendant, this offender, where she's got these
24 mixed emotions about someone who she expressed her love for,
25 and it may have been entirely heartfelt on her part, and she's

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1 being told that rather than a relationship that she was used or
2 raped and then gets a letter from him. Only opening again this
3 scab, all the pain and suffering that she's gone through by
4 getting another letter from him. And that doesn't strike me as
5 an individual who understands what he's done, understands that
6 what he's done has turned this poor girl's life completely
7 upside down.

8 Your Honor, I have attached, as part of our
9 sentencing memorandum, the letter from the victim's family. I
10 don't know if I can any better address or speak to the impact
11 the defendant's conduct has had on that family. But I did note
12 that this poor family was thrown into a media firestorm. Now,
13 is that his-- or is that his fault? Well, as far as I'm
14 concerned, yes. Because he is the one who committed the act.
15 And what he started were consequences and were events that were
16 directly attributable to the fact that he took a 12-year-old
17 girl from her home and decided to take her to Paris and to
18 France and Germany and created a huge uproar.

19 Now, I realize there was some bad press for the
20 United States, but we are a country. We are what, the sole
21 remaining superpower. We get bad press all the time. We
22 should expect that. That's fine. But not for the family, not
23 for this poor girl. This child's face was plastered all over
24 every single publication in the United Kingdom as a consequence
25 of what this defendant has done.

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1 Your Honor, I think I've taxed perhaps this Court's
2 patience, and I thank you. I've been speaking quite awhile.

3 Your Honor, I don't know ultimately how much time
4 this individual should serve, that's for this Court. But my
5 sense of what is a just sentence does not fall within this
6 range of 70 to 87 months.

7 Your Honor, as this Court has seen with more recent
8 prosecutions where, understandably so, the statutes have
9 changed or the guidelines have changed, I think there is a
10 recognition that these offenders and these offenses must be
11 addressed seriously and must be punished to the point where
12 other people-- others are deterred and that the specific
13 offender, the offender who is before this Court is deterred
14 from future misconduct.

15 Thank you.

16 THE COURT: Thank you, Mr. Mekar.

17 Mr. Denenfeld.

18 MR. DENENFELD: What is most remarkable about what
19 the government says in writing and orally is that they have
20 presented virtually no evidence in support, and yet they have
21 made serious allegations on a hot button issue, namely, having
22 sex with children. And I hope that the Court will hold the
23 government to its proofs before the Court decides to make a
24 significant upward departure.

25 Let me take them one at a time.

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1 The girl in Australia, while I would suggest to the
2 Court that was downright disingenuous for the government to
3 include the statement from the 10-year-old girl, but not to
4 include the statement from the mother. The mother, who
5 actually says that the first contact that Mr. Studabaker made
6 on this Neopets was to ask whether there were any mature people
7 out there. The mother who says that she developed a
8 relationship with Mr. Studabaker in which they talked about
9 adult topics ranging from the death of Mr. Studabaker's wife
10 while he was in the service to other kinds of family issues.
11 The mother who says that even after some discomfort with
12 Mr. Studabaker's conduct, the family still sent him a Christmas
13 card.

14 Then the government throws in these two girls in
15 Newaygo County. Those would be the two girls in Newaygo
16 County, where after an investigation, there was a conclusion
17 reached that nothing inappropriate occurred. That nothing
18 inappropriate occurred.

19 And then the most recent thing, this-- first of all,
20 I have to tell the Court, not surprisingly, I get a little bit
21 nervous when people are tossing me reports as I walk into a
22 sentencing, but let me at least tell you what I know about this
23 report. Ms. Davis contacted me in my office and we had a
24 conversation with the use of a hearing impaired assistance
25 operator. Ms. Davis was very concerned about the case, wanted

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1 to know what I believed Mr. Studabaker was looking at
2 sentence-wise, indicated to me that the two of them had
3 re-begun a friendship that they had started all the way back in
4 high school.

5 And with respect to her mother, Ms. Newman, I'm not
6 quite sure what to say about that, because one of the lawyers
7 in my office, who is present here today, spoke with Ms. Newman
8 when Ms. Newman agreed that she would, in fact, be power of
9 attorney for Toby Studabaker, and we drafted that for the
10 client, and we ended up transmitting that to the bank where
11 Mr. Studabaker has an account. I believe actually that went
12 badly after Ms. Newman cleaned out the account by using the
13 power of attorney. Why Ms. Newman is suddenly making reports
14 to the police, I can't address. I simply don't know the
15 answer, but I know I had personal contact with Ms. Davis, and
16 it's quite different from what I'm reading here today.

17 The bottom line is that there has been very little,
18 if any, credible, reliable evidence that has been presented to
19 you. And the government is making statements like a prior
20 history of trolling for children. I haven't heard any evidence
21 that suggests such a prior history. Grooming children. Well,
22 besides the S.P. matter for which he has already
23 served prison time and will no doubt be serving more, I haven't
24 heard any evidence of that either.

25 I've already addressed the Australian 10-year-old,

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1 and the fact that her mother seemed to have been as much of
2 that relationship as was the 10-year-old. The Newaygo County,
3 which seems to have had an airing and an investigation, and
4 which the conclusion was that nothing inappropriate had
5 occurred. It's almost like the 1998 St. Joseph County one,
6 which the government actually tried to piggyback onto a
7 five-level increase, even though it's unclear as to whether a
8 charge was ever even brought, and if a charge was brought, it
9 was promptly dismissed for insufficient evidence by the
10 prosecuting official. Boy, I would suggest that if we are
11 going to start increasing sentences on the basis of that kind
12 of evidence, that that would be troubling indeed.

13 With respect to the 5G1.3, I think, I honestly
14 acknowledge to the Court, I don't think 5G1.3 deals with this
15 situation. I would like to be able to make an argument that it
16 does, but I don't think it does. But I also believe that when
17 you compare Count One with, in this case, with what
18 Mr. Studabaker served time for in the UK, they are virtually
19 identical. I won't quibble with Mr. Mekaru, it's true the
20 elements may be different, but the bottom line is the facts are
21 identical as to what led to it.

22 Then let me address the child pornography in this
23 way: We established, and I'm sure the Court read the plea
24 transcript, a very narrow factual basis for that. In fact, it
25 was difficult to establish a factual basis. But Mr. Studabaker

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1 did acknowledge under oath that he was aware of the existence
2 of child pornographic images on the hard drive and that was
3 enough to satisfy the statute. Mr. Studabaker has steadfastly
4 maintained, and I don't think anyone has seriously questioned
5 it, he was not the person who downloaded those images. The
6 computer was being used in an army barracks in which a number
7 of people had access to it, etcetera.

8 The North Carolina charge was a charge that everyone
9 believed should have been disposed of in this case as well, it
10 wouldn't have made sense from the defense standpoint to have
11 Mr. Studabaker resolve this case and then have to have defended
12 himself in North Carolina, and so a plea bargain was reached,
13 and Mr. Studabaker stands by it. He did acknowledge that he
14 had knowledge of the existence of the images. But I would
15 suggest to you that that is pretty limited involvement in a
16 typical child pornography case where you're talking about
17 somebody who was clearly intentionally going out and
18 downloading images, which is not the case here.

19 I acknowledge again, and I acknowledged in what I
20 wrote, that the child pornography charge was not taken into
21 account in the UK. Again, I wish I could argue otherwise, I
22 can't. But I would suggest that, as I think even Mr. Mekaru
23 just acknowledged, the child pornography count here is
24 significantly less severe, particularly given the circumstances
25 of Mr. Studabaker's limited involvement and that he should be

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1 given some credit for the four years.

2 I also want to acknowledge, as I did in the footnote
3 in what I filed, that it's true that a significant portion of
4 the four years was based upon immigration holds while
5 Mr. Studabaker's solicitor ended up making various appeals
6 having to do with double jeopardy, the protections that are
7 quite different in Europe than they are in the United States.
8 Ultimately that appeal was lost and he was transported here.
9 But I would suggest if it walks like a duck and talks like a
10 duck. The bottom line is, he was locked up for four years as a
11 result of the UK conviction. And I'm sure it didn't make much
12 difference to Mr. Studabaker as to what he was being locked up
13 for, he was still being locked up in the very same place as a
14 result of his conduct.

15 Look, Mr. Studabaker has never made any excuses here,
16 and I don't think he will when he has an opportunity to speak
17 to you today. He knows that what happened was serious. He
18 knows that it was wrong. But I would also point out to the
19 Court that he completed a sex offender treatment program while
20 in the UK prison, a program that was completed incidently after
21 he tried to write that letter to Ms.-- or to S.P., however we
22 are referring to her. And again, I would suggest that the
23 letter was a clumsy attempt to try to make her feel better.
24 Mr. Studabaker is not mister sophistication, I think it's fair
25 to say that, and it was a clumsy attempt, but I don't think

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1 there's anything to suggest that he was trying to in any way do
2 anything except apologize and make her feel better for his
3 misconduct.

4 I just don't see how the existing guideline range has
5 not taken into account the details of this crime. And if you
6 look at the guideline calculation, every act that occurred here
7 was, in fact, scored and did, in fact, result in the guideline
8 calculus that we have. I understand the law may have changed,
9 but this Court knows, as well as I, that we take the law that
10 applied at the time the act was committed. I think
11 Mr. Studabaker is already looking, when you combine the UK time
12 with the time that he is facing here, a significant prison
13 sentence. If he has already done four years, he is looking at
14 the potential of more than seven additional years. It's not as
15 if Mr. Studabaker is going to walk away getting a tap on the
16 wrist. That's a significant sentence, a double-digit
17 sentence. And I would suggest that the government has simply
18 failed to present sufficient evidence to prompt the Court to
19 actually somehow grant an upward variance.

20 It's frankly, troubling to me that some of these
21 allegations are being made and, you know, as Mr. Mearu was
22 talking, I wrote down a couple of terms that he used several
23 times, maybe, perhaps Mr. Studabaker may or may not have known
24 about this seven year old. Now, well, you know what, you know
25 we are talking about imprisoning a person for longer than what

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1 is already a significant amount of time. And I would suggest
2 to the Court that maybe, perhaps and Mr. Studabaker may or may
3 not have known, is simply not sufficient.

4 Thank you.

5 THE COURT: All right, Mr. Denenfeld, let me ask you
6 a couple questions here.

7 As it relates to the documents that I've seen from
8 the Australian parent.

9 MR. DENENFELD: Yes.

10 THE COURT: Directing your attention to what I think
11 is Page 4 of that document. You indicate that in your
12 colloquy, that there is no connection between these two
13 youngsters, the youngster in Great Britain and the young person
14 in Australia, but a couple of statements in the parents'
15 statement jumped out at me as being reminiscent, shall we say,
16 of the contact with S.P. The top of the first complete
17 paragraph on Page 4. "Toby began to request to chat with Erin
18 more and more often. I found this a little odd." Jumping down
19 to the next paragraph. "Often when I logged onto the computer,
20 Toby would also get on line and make contact with me. Almost
21 immediately he would request to speak with Erin. I recall one
22 occasion Erin told me that Toby asked her what she was
23 wearing." This is, as I understand it, a 9 or 10-year-old
24 child. "I thought that was a strange question to ask a
25 9-year-old girl. Erin also told me that Toby would ask her

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1 whether her mom," meaning I presume that is English for mother,
2 "or dad or anyone else was in the room."

3 Now, those sorts of comments or questions don't
4 impress me as being-- I don't think you can interpret those,
5 and come back at me if you disagree with me, interpreting those
6 in context, don't they seem troubling similar to the
7 communications with S.P.?

8 MR. DENENFELD: As I think I indicated in my filing,
9 your Honor, there is no question that in those two paragraphs
10 the mother seems to be describing a certain level of discomfort
11 about Mr. Studabaker's actions during that period of time. But
12 I think a couple of things are worth noting. First of all,
13 apparently even after the conduct that she's describing, the
14 family sent him a Christmas card. Apparently at the time they
15 were not disturbed enough to have taken any action to cut off
16 the relationship. And in fact, she then describes ultimately
17 the relationship sort of ending as Mr. Studabaker started
18 talking about S.P., I think her initials are. But I would also
19 suggest to the Court that the statement, of course, was drafted
20 by law enforcement, and was drafted by law enforcement after
21 the fact. And, of course, when she then found out-- the mother
22 I'm talking about-- that there was inappropriate conduct with
23 this British young girl, my sense is that she probably then
24 went back and started putting a different gloss on things. But
25 what we do know is that while there was a level of discomfort,

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1 they did not cut off the relationship. They apparently did not
2 feel so uncomfortable that it was time to stop allowing
3 Mr. Studabaker to have contact with Erin. And again, they
4 apparently even sent a Christmas card for which Mr. Studabaker
5 tried to repay them with a gift of a camera, which ultimately,
6 I can't remember whether or not they accepted it or not, but I
7 certainly do acknowledge those two paragraphs. And I don't
8 know how analogous they are to the S.P. specific facts, but
9 clearly the issue about whether or not mom is around, etcetera,
10 is troubling. But on the whole, I think if you look at the
11 statement by the mother, the mother clearly indicates that
12 Mr. Studabaker first initially established the contact with
13 her, after he specifically asked on the website for a mature
14 person, whether or not there were, in essence, adults out there
15 that he could start a relationship with, and that much of the
16 relationship that he had with the mother was an adult level.
17 Talking about family issues, talking about spouses, talking
18 about the loss of his spouse.

19 So I acknowledge that those paragraphs are
20 troubling. But I think on the whole the statement by the
21 mother suggests that there was a significant amount of contact
22 that was going on on an adult level as well. And I would
23 suggest to you that if Mr. Mekaru is right, and that if
24 Mr. Studabaker really doesn't have any reason to go on this
25 website unless he is trolling or grooming for kids, it would be

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1 kind of odd to make your initial contact asking for adults out
2 there that you could establish a relationship with to talk
3 about adult topics.

4 THE COURT: Do you wish to address in any way the
5 factors that were noticed on my notice of consideration for
6 upward departure or variance, and if you do, that's fine, if
7 you don't, that's okay, too.

8 MR. DENENFELD: I tried to essentially cover a lot of
9 what I viewed as the concerns that the Court had about this.
10 So if you have questions about particular factors or issues,
11 I'm certainly happy to address them more specifically.

12 THE COURT: All right. I don't have any questions at
13 this point.

14 MR. DENENFELD: All right. Thank you, your Honor.

15 THE COURT: Thank you.

16 Mr. Studabaker, is there anything you wish to say in
17 your own behalf, sir? You can stand at the podium or remain
18 seated, whichever you wish.

19 THE DEFENDANT: Yes, sir. I would like to speak to
20 the seriousness of everything that's gone on. It's
21 inexcusable. Having four years, going on five years now, to
22 sit and think about everything that has gone on, and looking at
23 which way my life was going at that time, there is no excuse
24 for what I've done. None at all. And I'm not making any
25 excuses.

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1 Being over in England and doing the extensive course
2 that I done, the sex offenders treatment program, you know,
3 when I wrote those letters, it was before I started doing the
4 treatment program, and they came to me promptly and talked to
5 me about this and it was those that made me decide I needed to
6 go into this program to have a look at myself and see where I
7 needed to work on to keep myself from going back down this road
8 that I took, because I don't want to stand in front of you or
9 any other judge and have to explain myself again for actions
10 that aren't excusable.

11 The North Carolina, I knew they were on there, and I
12 should have done something about it, and I didn't. It was my
13 responsibility, it was my computer, and I didn't take
14 responsibility. I don't know what else to say about that.

15 THE COURT: So there is no link between the
16 communications with S.P. in Great Britain and the fact that
17 there was child pornography on your computer?

18 THE DEFENDANT: No, your Honor, no link. I didn't
19 download those. I don't know who did. Like I said, when I saw
20 them on there, I became disturbed that they were on there, but
21 I didn't take what I thought were the necessary steps. I tried
22 to get rid of them. You know, it wasn't until I was about
23 ready to get out of the Marine Corps that I had saw those, and
24 I thought through deleting them or getting rid of them, trying
25 to erase the hard drives off there that that was, you know,

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1 that was adequate. I didn't know exactly who I was supposed to
2 go to for that.

3 THE COURT: Well, how about your commanding officer?
4 If there were fellow Marines doing it, how about your
5 commanding officer?

6 THE DEFENDANT: One thing that we-- that's-- It's
7 hard to tell on people that have to watch your back when
8 you're, you know. I was in Afghanistan, and to tell on those
9 people, not knowing exactly who it was, you know, I didn't
10 know, you know, I didn't want to get the wrong person in
11 trouble. I didn't-- So I thought was I did what I thought
12 would take care of the problem. And I wanted to get rid of the
13 computer because I was getting ready to leave anyway, and I
14 didn't want those on there. I didn't want anyone else to see
15 those. And not knowing exactly who it was that downloaded it,
16 I don't know-- I didn't know who exactly to go to about it. I
17 didn't know who to tell and say, you know, give a specific
18 person who done it. I wish I had. I only wish I had, because
19 whoever did do it is still out there, is still doing this, and
20 that's where I failed, because I could have prevented more, you
21 know, if this person is doing more, and if carried on and taken
22 this further, you know, I could have stopped it. But yet here
23 I stand in front of you trying to-- No excuses, just no
24 excuse.

25 You know, I can say sorry until I'm blue in the face,

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1 but it doesn't cover what I've done.

2 Remorse. Do I have it? Yes. I think about
3 everything that I've done every day when I sit in that cell,
4 and what I could do to keep from going down this road. I
5 wanted to go into more extensive counseling. When I go--
6 wherever I get placed at, whatever institute I go to, I want to
7 get more psychological counseling to deal with the things that
8 have happened, like the death of my wife and the abuse when I
9 was younger myself, you know, the things that I haven't
10 addressed that could be factors that contributed to this, and I
11 don't want to go down that road again, I really don't. I don't
12 want to hurt anyone else like I've hurt-- the way I've hurt her
13 and her family.

14 One thing we learned in those-- the course, was
15 called a ripple effect. Throwing a stone into a pond and
16 seeing the, you know, when you throw a stone in a pond it
17 doesn't just stop right there at the point of where it entered,
18 it ripples out, it touches everything else, and that's what
19 happened here. You know, I hurt her. I hurt her family. I
20 hurt my family. I hurt my country. You know, it doesn't
21 stop. It just keeps going. And I don't want to do that
22 again. I don't want to stand in front of you or in front of
23 another judge and have to explain myself again why I'm here.

24 I want to be able to get through-- get the counseling
25 that I want to do, get a better education and get a job to

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1 where I can keep myself occupied and keep my mind occupied and
2 work on my relationships with my family, with friends, that I
3 know I'm going to have to rebuild, and it's going to be a long
4 road, and I don't expect it to be something that will be done
5 right away. But all I know is I don't want to end up here. I
6 don't want to hurt another person like I've hurt her. Not
7 again.

8 I don't know what else I can say, your Honor. You
9 know, I just thank you for giving me a chance to get up and say
10 at least that and know that, you know, this comes from, I
11 didn't have anything written down, I sat and tried to think of
12 something and, you know, I can write down all I want, but
13 that's coming from a piece of paper, but I want this to come
14 from me, from my heart, and to know that I mean what I say.
15 And, you know, that I don't want to recidivate, you know, end
16 up being back here. Nothing I have done is worth being back
17 here.

18 Thank you, your Honor.

19 THE COURT: Thank you, Mr. Studabaker.

20 Mr. Mekaru, did you have anything further?

21 MR. MEKARU: Your Honor, Mr. Studabaker has
22 repeatedly said he does not want to go down that road again,
23 doesn't want to hurt anyone else. While I think he is being
24 honest when he says that that's a risk of anyone else. What I
25 don't think he is being honest with respect to this child

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1 pornography. I don't think he is being honest that he has a
2 sexual interest in children. That is the risk. That's what he
3 doesn't want to do again. That's what he has to control.
4 That's what counseling is supposed to be addressing. That's
5 where you learn about avoiding triggers. That's where you
6 learn about this cognitive behavior that you need to address
7 the potential for recidivating.

8 The defendant, I think it said somewhere in here, I
9 was looking for it, that he didn't have any sort of sexual
10 interest in children. I don't see a 12-year-old child as being
11 a woman. That's a child. That's a sexual interest in
12 children. That is the risk.

13 So anyway, your Honor, I hear the defendant's
14 statement regarding this child pornography, and I find it
15 disingenuous. He knew it was on there. The images, we have
16 full file path information for those images, they weren't
17 deleted. We were able to match up file names. Once images are
18 deleted and they go into like space, a lot of information just
19 gets all-- we had all of that.

20 Two more points, your Honor. Regarding the St.
21 Joseph County case as being immediately dismissed. I realize
22 counsel is not privy to all the information the government
23 had. But what happened in that case, your Honor, was that the
24 victim and her family moved out of state. My recollection is
25 either Kentucky or Tennessee. St. Joseph County is a small

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1 county, did not have the financial wherewithal to continue the
2 prosecution where they would have to bring the victim and the
3 witnesses back from out of state to continue a prosecution.
4 Now, is that a lack of evidence? Perhaps. But I did not want
5 the Court to think that it was somehow deemed to be wholly
6 unbelievable.

7 Lastly, your Honor, again going back to this attached
8 report. Your Honor, we have as attached to this memorandum a
9 report that clearly identifies a child. We have made efforts
10 obviously to use only initials, as required by the local rules,
11 and in addition to the Rules of Federal Procedure to use
12 initials, I realize it was unintended by counsel, I mean no
13 criticism along those lines, but I would ask we perhaps
14 consider sealing that document.

15 And I also now with that said, I do realize that in
16 the government's own filing that we have included headlines
17 from papers where the child's name is clearly stated. I found
18 it difficult for myself to redact a newspaper, so I didn't do
19 that. But I do note that there was an instance where the
20 government itself was also filing and making notice of the
21 child's first name, but I didn't want to be accused of somehow
22 censoring the press by redacting, so that's kind of where we
23 stood.

24 But with respect to Erin-- excuse me, with respect to
25 the child in Australia, I do know, your Honor, as this Court

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1 was reviewing the report from the mother, in addition to this
2 notion of sharing Christmas cards, the defendant wanted to send
3 the child a web cam so he could see her. Your Honor, again, I
4 look at that as a continuing desire of the defendant to have
5 more and more access to a child. With a Web cam he could
6 actually see her, she could see him, in our summation, for
7 further grooming.

8 Thank you.

9 THE COURT: Thank you.

10 Mr. Denenfeld, I'll give you another chance, if you
11 wish.

12 MR. DENENFELD: Only to remind the Court on the child
13 pornography thing, the way the child pornography was found on
14 that computer was because the pizza delivery man, who
15 Mr. Studabaker sold the computer to, as he was leaving Camp
16 Lejeune, apparently discovered it. And my impression is that
17 Mr. Studabaker did actually, in fact, try to delete those
18 files. But I would simply remind the Court that this was
19 simply him selling a computer to a person who was trying to buy
20 a computer, and there was nothing more nefarious than that.
21 And I assume most of us, if we were aware of any kind of
22 pornography or sexual images, would probably try to take care
23 of those before sale, and my impression is that that's true.

24 With respect to the other things, I think I've made
25 my point. I simply believe that there has to be some

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1 reasonable level of evidence before the Court should increase
2 sentences. And I think the evidence here, while in places
3 could certainly be interpreted in a way that would-- that would
4 result in some concern about the way Mr. Studabaker acted in
5 some, particularly given the number of law enforcement
6 investigations that went on, and a number of these in which
7 nothing resulted, no prosecutions resulted, no charges, let
8 alone convictions, that I would ask the Court to simply proceed
9 cautiously.

10 Thank you.

11 THE COURT: Thank you, Mr. Denenfeld.

12 Well, I appreciate the submissions that I received
13 from all parties on this case. This is a difficult case, to
14 say the least, and I appreciate the assistance of the attorneys
15 with their submissions.

16 The Court's duty is to impose a sentence sufficient
17 but not greater than necessary to comply with the purposes of
18 sentencing set forth in 18 U.S. Code 3553(a). The Court
19 recognizes that the guidelines are advisory to the Court, but
20 the Court has taken the advisory guidelines into account as an
21 initial benchmark or starting point when sentencing in this
22 case.

23 I have from the government a request to upwardly
24 depart or impose an upward variance. I have a request from the
25 defendant to vary downward for the reasons stated in their

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1 papers. And this Court, on March 27th, as I've already
2 referred to, filed a notice that I was considering an upward
3 departure or variance from the advisory sentencing guidelines.

4 First, I want to say that I fully recognize my
5 discretion under the new line of Supreme Court cases to depart
6 from the sentencing guidelines or vary from the advisory
7 sentencing guidelines pursuant to the 3553 factors. So I am
8 fully aware of my discretion, and I'm fully aware of the fact
9 that the guidelines are just that, they are guidelines which
10 are advisory to the Court in formulating a sentence in this
11 case.

12 The 3553 factors are the nature and circumstances of
13 the instant offense, in this case, two offenses, and the
14 history and characteristics of the defendant. The sentence
15 must reflect the seriousness of the offense, promote respect
16 for law, provide just punishment for the offense, afford
17 adequate deterrence to criminal conduct, protect the public
18 from further crimes of the defendant, provide the defendant
19 with needed medical, educational and/or correctional treatment,
20 the need to avoid unwarranted sentencing disparity among
21 similarly situated defendants, and the kinds of sentences
22 available.

23 Clearly the only appropriate sentence in this case is
24 a prison sentence.

25 The defendant has requested that the Court recommend

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1 to the Bureau of Prisons that he get psychological counseling
2 while he is in the institution, and the Court will so
3 recommend. I recognize, as I will more fully explain a little
4 later, that Mr. Studabaker has completed a program in Great
5 Britain for broadly termed sex offenders, and I fully recognize
6 that he has completed this program, but he has asked for
7 psychological counseling and sex offender therapeutic treatment
8 while he is in the institution. I think that request is well
9 founded, and the Court will make such a recommendation to the
10 Bureau of Prisons.

11 As far as the history and characteristics of this
12 defendant, the defendant prior to his involvement in the crimes
13 that are the issue of this case, was an honorably discharged
14 marine from the United States Marines, had received awards and
15 citations while he was in the military. He has no criminal
16 history prior to this. He's obviously been convicted in
17 Britain, but that is generally part of the episode that brings
18 him to this court as well, but up until that time, until his
19 involvement with S.P., he had no prior criminal history. The
20 Court recognizes that.

21 He does have a mental health history of some note,
22 the various diagnoses are set forth in Paragraphs 120 and 121
23 of the report.

24 Paragraph 123 delineates the fact that he had
25 completed the sex offender treatment program in Great Britain.

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1 He has had in the past a substance abuse issue
2 involving alcohol, and that also should be addressed, and I'll
3 make a recommendation to the Bureau of Prisons that substance
4 abuse issues, specifically alcohol, or if an evaluation
5 requires addressing other substance abuse than that should be
6 addressed as well, so I'll make those recommendations to the
7 Bureau of Prisons.

8 The report is also clear that the death of
9 Mr. Studabaker's wife had a major impact on the defendant. I
10 take it as true that the death of his wife lapsed him into
11 depression and stress, and may have been, the word triggers is
12 referred to by Mr. Mearu in his colloquy with the Court, might
13 have been one of the triggers to get him involved in the very
14 significant offenses for which he finds himself convicted
15 before this Court. He asserts that his interests in
16 pornography started after his wife-- after his wife died.
17 There is really nothing in the record to show otherwise, so I
18 assume that-- I assume that statement to be true.

19 The victim in this case is a very young child, 11
20 years old when the first contact was made by the defendant with
21 the victim in July of 2002. The victim being a resident of
22 Great Britain. At that time, the defendant was 30 years old.
23 The contact was made through a website called Neopets and
24 through, I gather through reports, cellular telephones, but
25 generally the contact was the website from Neopets. From the

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1 report I conclude that that particular website is used by a
2 substantial minority of the total users of the website are
3 children under the age of 12.

4 Paragraph 30 of the report outlines communication
5 began with small talk issues, over time, and while I recognize
6 Mr. Denenfeld's objection to the use of the word grooming by
7 Mr. Mekaru as it relates to S.P., I think that was precisely
8 what was going on here. This defendant was grooming S.P. The
9 conversations became more sexually explicit to the point where
10 the defendant is sending a message to S.P. talking about
11 digital penetration of her. Now, this at this point is a 11 or
12 12-year-old girl. You can-- The Court concludes that over the
13 period of time there was, by Mr. Studabaker, a systematic
14 grooming of S.P. for what ultimately occurred overseas,
15 specifically in the country of France, in which the defendant
16 sexually penetrated this young girl.

17 Immediately after his discharge from the military due
18 to injuries, to Mr. Studabaker's credit, he has, as I've said
19 before, an honorably discharged marine, but regretfully and
20 tragically, immediately after his discharge, he started to
21 execute what I think was his plan-- I conclude that from the
22 report-- was his plan to have a sexual encounter with S.P.
23 overseas. He engages in travel arrangements to meet S.P. in
24 England with planned travel to France. He has contact with
25 travel agents where he describes S.P. as his niece, as being 12

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1 years old. There is a ruse with the travel agent to get her
2 passport number. He sends S.P. money, \$150 of money order, all
3 obviously outside the knowledge of S.P.'s parents. He meets
4 S.P. in Great Britain and then they fly to France in which
5 results in a sexual act performed by Mr. Studabaker on this
6 12-year-old girl in the country of France. He takes the child
7 to Germany, and at that point, his crimes have become a matter
8 of international press treatment. He, to his credit, he does
9 put S.P. back on a plane to England, back to her parents, and
10 he surrenders to authorities in Germany.

11 There are also, in addition to the sophisticated
12 planning that I've already laid out on the record, there were
13 other interesting points here of sophistication in terms of
14 Mr. Studabaker not being wanted to be-- wanting to be
15 apprehended by the authorities, and secreting of this young
16 person by the purchase and use of hair dye for both he and S.P.
17 to disguise their physical appearances to make it less likely
18 that they are going to be apprehended by authorities. His
19 first reaction is to lie to the German authorities about his--
20 about S.P.'s age, describing her as being 18 or 19 which, of
21 course, that's on Page 41 of the report and, of course, she is
22 significantly younger than that.

23 That captures, I think, a significant portion of the
24 nature and circumstances of this offense, but I don't think it
25 captures-- the letter captures it very well, but I don't think

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1 it captures another significant harm that occurred in this
2 case. And that is the utter terror of S.P.'s parents when they
3 realized that their 12-year-old daughter is gone, and they
4 discover that she has been in internet communication with this
5 defendant. For approximately four days, her parents did not
6 know her whereabouts. They had no idea where their 12-year-old
7 daughter was or her fate. They didn't know whether she was
8 alive or dead.

9 Now, fortunately for her parents, it was only four
10 days. But the guidelines, in the Court's judgment, do not
11 adequately take into account that portion of the nature of this
12 heinous crime. And their letter, which is part of the record
13 here, says it all; total panic, complete fear, physically
14 sick. S.P.'s mother had feelings of guilt for not protecting
15 her own daughter. And most poignantly, "We can never go back."

16 It seems to me that those harms that the defendant inflicted
17 on S.P.'s parents in this abduction are nowhere calculated in
18 the guidelines adequately, which is one of the reasons why the
19 Court intends to upwardly depart from the guidelines.

20 The Court also notes that I do not believe that a
21 two-level enhancement pursuant to 2A3.2(b)(2)(B), under the
22 2003 version of the guidelines, which is presently under those
23 guidelines a two-level enhancement, that that in the Court's
24 judgment does not adequately reflect the seriousness of the
25 conduct in this case. So I intend to upwardly depart for those

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1 reasons as well.

2 As far as the possession of child pornography is
3 concerned, the defendant has 706 child pornography images.
4 There were 56 movies which depict sexual activity between
5 adults and minors. This crime implicates another set of
6 victims. I note that the defendant denied that he downloaded
7 these images. I don't believe him. I just do not believe
8 him. The conduct that was the subject matter of the instant
9 offenses and the child pornography on his computer, in my
10 judgment, is linked, and I don't believe his assertion that he
11 is not responsible for those images being on his computer. I
12 don't believe that for one nanosecond.

13 The Court wants to associate itself with the comments
14 made by the Third Circuit in United States vs Goff, it's a 2007
15 Court of Appeals case from the Third Circuit, which among other
16 statements says, "Consumers of child pornography create a
17 market, thereby providing economic motive for creating and
18 distributing materials." And creating the market is the use of
19 young children to produce these dastardly materials.

20 I have very significant concerns regarding
21 Mr. Studabaker's recidivism potential. He says he wants to
22 address it. I hope he is sincere. I saw him get emotional
23 while he was at the podium. I believe him when he says he does
24 not want to recidivate. But I think the statement in Paragraph
25 66 of the report in which he denies that he has been attracted

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1 to minors other than S.P. is simply not true, it's not
2 credible, and in the Court's judgment, it increases
3 significantly, at least at this point when I'm sentencing him,
4 on April 21st of the year 2008, causes the Court to have
5 significant concerns about recidivism.

6 And I recognize Mr. Denenfeld's objections to some of
7 Mr. Mekaru's statements about possibly and may, and Mr.
8 Denenfeld is right on as far as that is concerned, but on the
9 other hand, I think the mother of the girl in Australia and her
10 description in the paragraphs that I referred to during the
11 colloquy with counsel are clearly an indication that he was
12 going through the same process with this girl in Australia that
13 he was going through with S.P. Fortunately for the girl in
14 Australia, she had more parental control and awareness of what
15 was going on. And I appreciate Mr. Denenfeld's comment in
16 representing Mr. Studabaker, that they still communicate-- they
17 sent Mr. Studabaker a Christmas card or there was some exchange
18 during Christmas. Frankly, I think that stems more from a lack
19 of understanding by the parent of what was going on here than a
20 sincere desire to want to communicate with Mr. Studabaker,
21 because I think if they fully understood the breadth of
22 seriousness of this case, they wouldn't have sent
23 Mr. Studabaker any gifts.

24 As far as the references to the uncharged conduct in
25 other counties of-- the St. Joe County case has been referred

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1 to, the contact with Newaygo County youngsters has been
2 referred to, I have disregarded that. I just-- I think
3 Mr. Denenfeld's point is well taken, that the evidentiary
4 impact of that material is not sufficient for this Court to
5 base its decision on those matters. But I do think that the
6 contact with the girl in Australia does have some impact on
7 this case, and quite appropriately so, given the nature of that
8 girl's mother's statements, and I have considered that. But
9 all the other stuff, including the most recent revelations from
10 Kalamazoo County, and I appreciate that came under the category
11 of breaking news, and the government and Mr. Denenfeld were
12 dealing with information that was coming at them very quickly
13 and very close to the sentencing date here, but the ambiguity
14 of that relationship with the individuals who have been named
15 coming out of the Kalamazoo County sheriff's report, again, I
16 think is material that doesn't rise to the level in which it is
17 appropriately considered by me for purposes of this sentencing
18 of Mr. Studabaker.

19 However, I do believe that there is reason for
20 departure upward of two levels for the fact under
21 2A3.2(b)(2)(B), in that I don't think the 2003 version of the
22 Guidelines appropriately takes into consideration the nature of
23 the undue influence of the defendant over the minor victim, by
24 that I mean S.P. In addition to that, the victimization of the
25 parents is extraordinary in this case, and in the Court's

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1 judgment is not addressed adequately by the guidelines, so I
2 intend to depart upward one level for that. And likewise, I
3 believe that for the reasons I've already stated, that a
4 combination of the need to protect Mr. Studabaker from further
5 crimes and victimizing further individuals, as well as taking
6 adequately into account the deterrence of others calls for
7 combined an additional two levels. So the Court intends to
8 depart up five levels on Count One. I do not intend to depart
9 on Count Two, that being the child pornography count, but I am
10 going to depart upward five levels, which results in a
11 guideline range of 135 to 168 months, which leaves me with the
12 point well taken by Mr. Denenfeld that the defendant has served
13 some period of time in Great Britain for conduct which is
14 addressed in the count of conviction in Count One of 03-291.
15 And I think that calls for some reduction from the upper level
16 of the guideline range because, if that factor had not been
17 taken into account, I would have sentenced at the upper end of
18 that guideline range of 135 to 168, but I will move to the
19 middle of that guideline range to account for the fact that
20 Mr. Studabaker has served time in prison in Great Britain.

21 Accordingly, for all those reasons, it's the judgment
22 of the Court that the defendant, Toby t. Studabaker, hereby
23 committed to the custody of the Bureau of Prisons to be
24 imprisoned for a term of 144 months in Case No. 03-291, and a
25 term of 87 months, at the top of the guideline range, in Case

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1 No. 07-267. Those sentences are to be served concurrently.

2 Upon release from prison, the defendant shall be
3 placed on supervised release for a term of 60 months in both
4 cases, to be served concurrently. Within 72 hours of release
5 from custody of the Bureau of Prisons, the defendant shall
6 report in person to the probation office in the district to
7 which the defendant is released.

8 While on supervised release, the defendant shall
9 comply with the mandatory and standard conditions of
10 supervision including: DNA collection, drug testing, sex
11 offender registration. He is not to be in possession of any
12 firearms, destructive devices or dangerous weapons.

13 The following special conditions of supervised
14 release are also ordered:

15 The defendant shall provide the probation officer
16 with access to any requested financial information.

17 The defendant shall participate in a program of
18 testing and treatment for substance abuse, as directed by his
19 probation officer, until such time as the defendant is released
20 from the program by his probation officer, and shall pay at
21 least a portion of the cost according to his ability as
22 determined by his probation officer.

23 The defendant shall refrain from all use of alcoholic
24 beverages.

25 The defendant shall participate in a program of

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1 mental health treatment for sex offenders, as directed by his
2 probation officer, until such time as the defendant is released
3 from the program by his probation officer, and shall pay at
4 least a portion of the cost according to his ability as
5 determined by his probation officer.

6 The defendant shall refrain from frequenting
7 locations where minors gather.

8 The defendant shall not possess a computer system or
9 access to any Internet, including Web TV or similar services,
10 without the permission of his probation officer.

11 The defendant shall not possess pornographic
12 materials, patronize establishments where such materials are
13 sold, or possess any materials promoting the normalization of
14 criminal behavior.

15 The defendant shall not associate with persons under
16 the age of 18, except in the presence of responsible adult who
17 is aware of the defendant's backgrounds and current offense and
18 who has been approved by the probation officer.

19 The defendant shall report to the probation officer
20 all visits with relatives or friends who have minor children.

21 The defendant shall not possess or publicly display
22 any materials that may be viewed as lures for minors, as
23 determined by his probation officer.

24 The defendant shall refrain from accepting or seeking
25 civic, religious, or other voluntary positions where he would

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1 be in a position of authority or have influence over others,
2 including minors and their families.

3 The defendant shall be required to provide a detailed
4 itinerary of vacations and leisure activities, including all
5 persons with whom he interacted or-- with whom he interacted or
6 had contact.

7 The special assessment in each case of \$100 is
8 assessed, for a total of \$200, which shall be due immediately.

9 I also want to add a prohibition on cell phones. The
10 defendant shall not be in possession of a cell phone, without
11 the permission of his probation officer. If he does have a
12 cell phone, with permission of his probation officer, it shall
13 be in his name and he shall give the probation officer access
14 to the account and the history on the account.

15 The Court is not going to order a fine here. I find
16 that he does not have the ability to pay a fine.

17 And I believe that concludes the recommendations for
18 supervised release.

19 If it's not already clear from the record, I have
20 considered all of the 3553 factors. I think the thing-- the
21 sentences that I have imposed reflect the gravity and very
22 serious nature of these offenses, promote respect for the law,
23 provide adequate deterrence both to Mr. Studabaker and to
24 others, and for the reasons I've stated, protect people from
25 further crimes of the defendant, based on the Court's very

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1 strong concern that at this point Mr. Studabaker has a
2 significant threat of recidivating.

3 Mr. Denenfeld, any recommendations to the Bureau of
4 Prisons that you wish me to add which I have not covered?

5 MR. DENENFELD: No, your Honor.

6 Your Honor, I want to make sure that the calculation
7 is correct. I thought we started with an offense level of 27.

8 THE COURT: Right.

9 MR. DENENFELD: You upwardly departed five levels to
10 32, and if that's correct, my chart indicates the range of 121
11 to 151, not 135 to 168.

12 THE COURT: Is that right, Mr. Mekaru Did I misread
13 it?

14 MR. MEKARU: I think Mr. Denenfeld is correct, your
15 Honor.

16 THE COURT: Okay. All right. Well, then I
17 misspoke. I intended to go to the middle of the range, so what
18 is the new one, 121?

19 MR. DENENFELD: 121 to 151.

20 THE COURT: 151, so half of that would be-- the
21 difference is 30, so it would be 136, I apologize. 136 on
22 Count One, not 144.

23 Thank you for the correction.

24 MR. DENENFELD: Thank you.

25 THE COURT: Thank you, Mr. Denenfeld. I don't know

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1 how that happened, but I thank you for your correction.

2 Any legal objections to the sentence imposed, sir,
3 that have not already been placed on the record?

4 MR. DENENFELD: Your Honor, I admit I try to keep up
5 with the Sixth Circuit law, and I'm not sure I am, but I know
6 that this Vowell case Mr. Mekaru cited requires me to object,
7 and so at this time, I guess, I would object to the upward
8 variance and departure as being procedurally and substantially
9 unreasonable. I say that only because I think that covers the
10 basis for appeal.

11 Thank you.

12 THE COURT: Mr. Mekaru, any objection?

13 MR. MEKARU: Just I'm not quite certain about the
14 term of supervised release, and I just wanted to make certain
15 that the Court-- I know the recommendation and the statutory
16 provision on the back indicates the cap would be five years,
17 but, your Honor, it's my recollection under the Protect Act in
18 April, 2003, that it changed 3583 to allow a term of supervised
19 release to any term of years up to life. The Adam Walsh Act
20 required there be a mandatory minimum of five years up to
21 life. So I wasn't certain if the Court found bound and capped
22 by the five years by statute or if the Court was of a mind to
23 impose something greater, and that would be again, your Honor--
24 I forgot to bring the 2003 edition, but it is my recollection
25 that was the change of 3583 to allow up to life, and that's

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1 what I've been-- that was in the plea agreement originally and
2 that was operating under that assumption.

3 THE COURT: All right. Well, I appreciate that,
4 Mr. Mekaru, but I'm going to order five years.

5 MR. MEKARU: Yes, sir.

6 THE COURT: Okay.

7 MR. MEKARU: And regarding your question, no
8 objection.

9 THE COURT: All right. Any counts to be dismissed?

10 MR. MEKARU: Yes, your Honor. With respect to the
11 charge in Michigan, we move for dismissal of Counts Two, Three
12 and Four.

13 THE COURT: So ordered.

14 MR. MEKARU: With respect to the charges in North
15 Carolina, move for dismissal of Counts One and Three, and that
16 we are foregoing any sort of forfeiture action.

17 THE COURT: All right. That motion is granted as
18 well.

19 All right. Anything further before I give
20 Mr. Studabaker his appellate rights?

21 MR. DENENFELD: Not on behalf of the defense. Thank
22 you, your Honor.

23 MR. MEKARU: No, your Honor. Thank you.

24 THE COURT: All right. Mr. Studabaker, I advise you,
25 sir, you can appeal your conviction, if you believe that your

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1 guilty plea was somehow unlawful or involuntary or if there is
2 some other fundamental defect in proceeding not waived by your
3 guilty plea. You also have a statutory right to appeal your
4 sentence under certain circumstances, particularly if you think
5 the sentence is contrary to law.

6 However, a defendant may waive those rights as part
7 of a plea agreement, and you have entered into a plea agreement
8 which waives some of your rights to appeal, although I think
9 that was for a sentence within the guideline range, if I'm not
10 mistaken, so to the extent that I've upwardly departed, you
11 have preserved your right to appeal that. Such waivers are
12 generally enforceable, but if you believe the waiver is
13 unenforceable, you can present that argument to the appellate
14 court.

15 You have the right to apply for leave to appeal in
16 forma pauperis, that is, if you are poor. If you wish to do
17 so, with few exceptions, you need to file the documents for
18 which your attorney has acknowledged receipt on your behalf,
19 within ten days of the entry of the judgment in this case. If
20 you file the documents, the Clerk of the Court will prepare and
21 file a Notice of Appeal to the Sixth Circuit Court of Appeals
22 on your behalf.

23 Is there anything further before I remand the
24 defendant, Mr. Mekaru?

25 MR. MEKARU: No, your Honor. Thank you.

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1 THE COURT: Mr. Denenfeld?

2 MR. DENENFELD: Not on behalf of the defendant.

3 Thank you, your Honor.

4 THE COURT: Defendant is remanded to the marshal for
5 execution of sentence.

6 COURT CLERK: All rise, please.

7 Court is adjourned.

8 (at 4:46 p.m., proceedings were adjourned.)

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REPORTER'S CERTIFICATE

I, Kathleen S. Thomas, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

I certify that the foregoing is a true and correct copy of the transcript originally filed with the clerk of court on 9/23/08, and incorporating redactions of personal identifiers requested by the following attorneys of record: Daniel Y. Mekaru in accordance with Judicial Conference policy. Redacted characters appear as initials replacing the minor's name in the transcript.

/s/

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